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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ARTHUR LYNAH ET AL. } No. 45.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHARLES A. WILLIAMS AND AMELIA S. WILLIAMS. } No. 59.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR OF AUTHORITIES RELIED UPON.

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ON QUESTION OF JURISDICTION.

Mr. Keener, in his work on Quasi Contracts, pages 159, 160, 161, writing of the waiver of tort, lays down these propositions:

> If anyone, in the commission of a tort, enriches himself by taking or using the property of another, the latter may in some cases, instead of suing in tort to recover damages for the injury done, sue in assumpsit to recover the value of that which has been tortiously taken or used. The remedies in tort and assumpsit not being concurrent, a plaintiff is compelled to elect which remedy he will pursue, and if he

elect to sue in assumpsit he is said to waive the tort. The doctrine of waiver of tort is simply a question of the election of remedies. Said Allen, J., in *Cooper* v. *Cooper:*

"The same act or transaction may constitute both a cause of action in contract and in tort, and a party may have an election to pursue either remedy, and in that sense may be said to waive the tort and sue in contract. But a right of action in contract can not be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained."

Assuming a defendant to be a tort feasor, in order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby. That the plaintiff has been impoverished by the tort is not sufficient. If the plaintiff's claim, then, is in reality to recover damages for an injury done, his sole remedy is to sue in tort.

And in support of these propositions, among other authorities, he quotes Judge Rapallo, of the supreme court of New York, in *National Trust Co.* v. *Gleason* (77 N. Y., 400):

To maintain such an action, it is necessary to establish that the defendants have received money belonging to the plaintiff or to which it is entitled. That is the fundamental fact upon which the right of action depends. It is not sufficient to show that they have by fraud or wrong caused the plaintiff to pay money to others, or to sustain the loss or damage. That is not the issue presented in the action.

And, as bearing upon both the denial of the title in the defendant and the doctrine of enrichment, reference is here made to what was said by Mr. Justice Harlan, in delivering the opinion of the court in *United States* v. *Great Falls Manufacturing Co.* (112 U. S., 657):

> The case is materially different from *Langford* v. *United States* (101 U. S., 341). That was an action in the Court of Claims against the United States to recover for the use and occupation of certain lands and buildings to which the claimant asserted title. It there appeared that, throughout the whole period of such occupation and use, the title of the claimant was disputed by the Government, and that the possession was taken and held by its agents in virtue of a title asserted to be in the United States. The jurisdiction of the Court of Claims was attempted to be sustained upon the ground that the Government, in taking and using the property of an individual against his consent and by force, could not, under the relations between it and the citizen, commit a tort, but was under an implied obligation, created by the Constitution, to pay for the property or for the use of the property so taken. This proposition was held to be untenable under the facts of that case for the reason that while individual officers of the Government might be guilty of a tort if the property *so held* by them was in fact private property, yet if the Government never recognized the property as private property, taken by its agents for public use, it could not be held liable for its value as upon implied contract.

And also in *Great Falls Manufacturing Co.* v. *Attorney-General* (124 U. S., 597):

> In reference to the allegation that the survey and map made by the Secretary were not sufficiently accurate, and that the notice published by the Attorney-General was materially defective, it may be further said that all such objections were waived by the company when, proceeding under the act of 1882, it invoked the jurisdiction of the Court of Claims to give judgment against the United States for such compensation as it was entitled to receive for its land and water rights. Even if the Secretary's survey and map and the publication of the Attorney-General's notice did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the Government recognizes and retains the possession taken in its behalf for the public purposes indicated in the act under which its officers had proceeded.

II.

As to the necessity on the part of the United States to make compensation for injury or damage to the shore or flat lands under the claim that they are private property taken for public uses.

In the case of *Shively* v. *Bowlby* (152 U. S., 1), which is a leading case, Mr. Justice Gray, in an elaborate and exhaustive opinion, reviews and states the law, as

it obtains at the common law and in the States and Territories of the Union, upon the title to the soil of the sea and arms of the sea and shores and flats. The review of the authorities is complete and thorough, and the conclusions, so ably and synthetically stated, are relied upon to support the position of the plaintiff in error here.

It is held, *inter alia*, that the title and rights of riparian or littoral proprietors in the soil between high-water mark of navigable waters are governed by the local laws of the several States, subject, of course, *to the rights granted to the United States by the Constitution* (p. 40.)

In *Hardin* v. *Jordan* (140 U. S., 371), Mr. Justice Bradley, in the opinion of the court, said:

> With regard to the grants of the Government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the State within which they are situated, if a State has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery—and can not be retained or granted out to individuals by the United States.
>
> Such title being in the State, the lands are subject to State regulation and control, under the condition, however, of not interfering with

> the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, State control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce and in subjecting the lands to the necessities and uses of commerce. This right of the States to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the Crown in England.

In *Hoboken* v. *Penn. R. R. Co.* (124 U. S.) Mr. Justice Matthews, delivering the opinion of the court, said (p. 688):

> In the examination of the effect to be given to the riparian laws of the State of New Jersey by the act of April 11, 1864, in connection with the supplementary act of March 31, 1869, it is to be borne in mind that the lands below high-water mark, constituting the shores and submerged lands of the navigable waters of the State, were, according to its laws, the property of the State as sovereign. Over these lands it had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest,

subject to the power conferred by the Constitution upon Congress to regulate foreign and interstate commerce. The object of the legislation in question was evidently to define the relative rights of the State, representing the public sovereignty and interest, and of the owners of land bounded by high-water mark. The regulations to this end had in view a definite and permanent demarcation of the line in the water, beyond which there should be no obstructions or impediments to the public right of navigation. They also contemplated, as of equal importance, the manner in which and the persons by whom the intermediate space between those exterior lines and the original high-water mark should be filled up, reclaimed, occupied, and used, so as to make the enjoyment of such property most valuable to private and public interests involved in the public right of navigating the water. It was for this reason that this space was made the subject of grants by the State to corporations and other persons who were riparian owners adjacent thereto, with authority to erect or build thereon docks, wharves, and piers; and that prior grants of a similar character under legislative authority were confirmed and perpetuated. It was for that reason that in the grant to the united companies this right and privilege of erecting and making wharves, piers, and other improvements was declared to be "so that they may safely make such improvements as they may find necessary to facilitate their business." For the same reason it was declared in the act of March 31, 1869, that the

conveyance or lease of the commissioners under the act should not merely pass the title to the land therein described, but the right to reclaim and fill in and otherwise improve the same, and "to appropriate the lands to exclusive private uses."

* * * * *

It was, therefore, held in that case (*Stevens* v. *Patterson, etc.*, 5 Broom, 532) that it was competent for the legislative power of the State to grant to a stranger lands constituting the shore of a navigable river under tidewater, below the high-water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of the riparian owner from his lands to the water, and that without making compensation to him for such loss. The act of March 31, 1869, as we have seen, afterwards secured to the riparian owner the option of purchasing from the State its title to the shore, or, if granted to a stranger, compensation for the value of his privilege.

The title to lands under tide water, within the realm of England, were, by the common law, deemed to be vested in the King as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse. The King, by virtue of his proprietary interest, could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reser-

vation of the public right, and so far as it assumed to interfere with it or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void. In his treatise, De Jure Maris, Lord Hale says: "The *jus privatum* that is required by the subject, either by patent or prescription, must not prejudice the *jus publicum* wherewith public rivers and the arms of the sea are affected to public use;" and Mr. Justice Best, in *Blundell* v. *Caterall*, 5 Barn. & Ald., 268, in speaking of the subject, says: "The soil can only be transferred subject to the public trust, and general usage shows that the public right has been excepted out of the grant of the soil."

The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and, if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying it. The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringements, subjecting it only to such regulation by the State, in the interest of the public, as is deemed consistent with the preservation of the public right.

People v. *N. Y. & S. I. F. Co.*, 68 N. Y., 71, 76; quoted by Mr. Justice Field in *Ills. Cen. R. R. Co.* v. *Ills.*, 146 U. S., 387, 458.

The soil under navigable waters being held by the people of the State in trust for the common use, and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is therefore appropriately within the exercise of the police power of the State. (*Ills. Cen. R. R.* v. *Ills.*, 146 U. S., 459.)

See also *McCready* v. *Virginia*, 94 U. S., 391, 394;
Pollard v. *Hogan*, 44 U. S., 212;
Boston v. *Lecraw*, 17 How., 426;
Com. v. *Charlestown*, 1 Pick., 180;
Com. v. *Alger*, 7 Cush., 53, 78, 79;
Rundle v. *Delaware and Raritan Canal Co.*, 14 How., 79;
Fisher v. *Haldeman*, 20 How., 186;
Phear on Waters, 52, 53.

Respectfully submitted.

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